UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SKYWIZARD.COM, LLC,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-275-P-DMC***
	)	
COMPUTER PERSONALITIES	***)***	
SYSTEMS, INC.,	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON MOTIONS TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT[1]

Computer Personalities Systems, Inc. ("CPSI") moves pursuant to Fed. R. Civ. P. 52 to amend this court's findings of fact and conclusions of law entered on May 2, 2000 following a two-day bench trial held before me on April 24-25, 2000. Defendant's Motion Pursuant to Fed. R. Civ. P. 52 To Amend Findings of Fact and Conclusions of Law Entered on May 2, 2000, etc. ("Findings Motion") (Docket No. 36); *see also* Findings of Fact and Conclusions of Law ("Findings") (Docket No. 34). In a parallel pleading, CPSI also moves pursuant to Fed. R. Civ. P. 59 to amend the court's judgment in favor of Skywizard.com, LLC, in the amount of $51,441.32 entered on May 3, 2000. Defendant's Motion Pursuant to Fed. R. Civ. P. 59 To Amend Judgment Entered on May 3, 2000, etc. ("Judgment Motion") (Docket No. 37); *see also* Judgment (Docket No. 35). For the reasons that follow, the motions are granted.

[1]Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

Federal Rule of Civil Procedure 52(b) provides in relevant part, "On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly." Pursuant to Fed. R. Civ. P. 59(e), "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Rule 52(b) enables the correction in the context of a bench trial of manifest errors of fact or law or the consideration of newly discovered evidence. *See, e.g.*, *United States v. Municipal Auth. of Union Township*, 181 F.R.D. 290, 293 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998); *United States v. Local 1804-1, Int'l Longshoremen's Ass'n,* 831 F. Supp. 167, 169 (S.D.N.Y. 1993), *aff'd*, 52 F.3d 1173 (2d Cir. 1995). In like vein, "[m]otions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence. They may not be used to argue a new legal theory." *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) (citations omitted).

At the conclusion of the bench trial in this matter I found in relevant part that (i) CPSI was contractually obligated to pay Skywizard $79 per computer shipped as a result of a so-called "Special Promotion," (ii) CPSI breached the contract by failing to hold a Special Promotion in September 1999, and (iii) for each Special Promotion customer who actually subscribed to Skywizard's internet service, Skywizard incurred a loss of $44.04 annually, consisting of the average wholesale cost to Skywizard to provide phone connections to the internet for that customer ($10.25 per month) minus the $79 CPSI Special Promotion fee, equal to $6.58 per month. Findings ¶¶ I(4), I(7)-(8), II(6). I then also concluded in salient part:

> 8. Of the 800 CPSI customers to whom computers would have been shipped had the September 1999 Special Promotion aired, approximately one-third, or 267, would have become Skywizard subscribers.
>
> 9. Skywizard's damages total $51,441.32, calculated as follows: $63,200.00 (800 computers shipped x $79 fee) minus $11,758.68 (267 new prepaid subscribers x loss of $44.04 each incurred to service accounts for one year).

Id. ¶¶ II(8)-(9). I further explained in a footnote to Paragraph II(8):

> Counsel for the defendant pointed out at trial that, were all of CPSI's Special Promotion customers to take advantage of the offer of one year's free internet service (as they theoretically could), the $79 per customer fee would be more than offset by the cost to Skywizard of servicing all of the new subscribers. However, the evidence demonstrated that historically one-third of these customers had chosen to subscribe to Skywizard. Nothing in the evidence nor in everyday experience compels the conclusion that customers who elect not to take advantage initially of the offer of one year's free service (and thus affirmatively reject Skywizard's service) will attempt to accept that offer weeks or months later.

CPSI challenges the court's methodology on several fronts, ranging from its big-picture conclusions (*e.g.*, that 800 computers would have been sold and that only one-third of those customers would have subscribed to Skywizard) to its damage-award calculations. *See generally* Findings Motion; Judgment Motion.

As an initial matter I observe that, even assuming *arguendo* that the big-picture conclusions were correct, there is indeed a manifest error in the calculations flowing therefrom. The "purpose of compensatory damages in a contract case is to put the victim of a breach in the same position it would have occupied had there been no breach." *Down East Energy Corp. v. RMR, Inc.*, 697 A.2d 417, 419 (Me. 1997) (citation and internal quotation marks omitted). In arriving at damages I therefore should have subtracted Skywizard's cost avoided (*i.e.*, the average $10.25 per month wholesale cost per subscriber of providing internet phone connections, amounting to $123.00 annually) from the $79.00 annual Special Promotion fee it would have received. *See, e.g., Rasnick v. Tubbs*, 710 N.E.2d 750, 754 (Ohio Ct. App. 1998) (costs avoided must be subtracted from reasonable cost to buyers to complete construction of race car); *Sterling Freight Lines, Inc. v. Prairie Material Sales, Inc.*, 674 N.E.2d 948, 951 (Ill. Ct. App. 1996), *appeal denied*, 684 N.E.2d 1342 (Ill. 1997) ("Those costs that are avoided as a result of the defendant's breach are deducted from the contract price."). I instead erroneously subtracted Skywizard's loss avoided, amounting to $44.04 per subscriber annually. Thus, total damages should have been assessed at $30,359.00, calculated as follows: $63,200.00 (800 computers shipped x $79.00 fee) minus $32,841.00 (267 new prepaid subscribers x loss of $123.00 each incurred to service accounts for one year).

Beyond this, I am persuaded on reconsideration that there is a larger manifest error in my conclusion that, had the September 1999 CPSI Special Promotion aired, only one-third of the resultant customers would have become Skywizard subscribers. Skywizard did indeed present undisputed evidence that as of March 2000 approximately one-third of the Special Promotion customers to whom CPSI had shipped computers were Skywizard subscribers. *See* Findings ¶ I(7). However, I conclude on reexamination that this solitary piece of evidence was insufficient to constitute the kind of historic company data from which a reliable projection could be made.

First, Skywizard presented merely a one-time snapshot of the contents of its customer database, failing to show any type of consistent pattern over time. Second, Skywizard in any event had little historic experience with Special Promotion customers given that CPSI did not even begin to run Special Promotions until summer 1999. *See id*. ¶ I(6). Third, Skywizard imposed no deadline on the time frame within which Special Promotion customers could activate their prepaid Skywizard subscriptions. *See id*. ¶ I(7). Fourth, Skywizard had made no attempt to contact CPSI customers who had not subscribed to determine, for example, why they had not done so or whether they were planning to do so. *See id*. Fifth and finally, Skywizard President Gary Cubeta acknowledged at trial that his claimed profit margin of $6 per customer was wrong as to Special Promotion (or "prepaid") customers, whom he conceded "can sign up over time." Transcript of Bench Trial, Day One (Docket No. 38) at 230.

The "well settled law [is] that damages are not recoverable when uncertain, contingent, or speculative." *Down East*, 697 A.2d at 420 (citation and internal quotation marks omitted). Although damages need be proved only with reasonable certainty not mathematical exactitude and "triers of facts are allowed to act upon probable and inferential as well as direct and positive proof," *id*., I am upon fresh reflection constrained to agree with CPSI that Skywizard offered little more than speculation that only one-

third of the CPSI September 1999 Special Promotion customers would have subscribed to the prepaid Skywizard internet service.[2]

It was thus manifest error to conclude that Skywizard had, with the requisite reasonable certainty, established its entitlement to damages for CPSI's breach. Nonetheless, in light of CPSI's clear breach of its agreement to run a September 1999 Special Promotion, I conclude that nominal damages in the amount of $100 (as suggested by CPSI in one of its alternative recommendations) are warranted. *See Susi v. Diamond Match Co.*, 158 A. 698, 699 (Me. 1932) ("In the absence of evidence [of damages caused by failure to market standing timber], only nominal damage may properly be assessed against defendant on this item.").

In light of the foregoing, I grant CPSI's motions to amend as follows:

1. Paragraphs II(7)-(9) of the Findings are deleted and replaced with the following paragraph:

> Regardless of the number of computers that CPSI may have shipped to customers had a September 1999 Special Promotion aired, the evidence is insufficient to substantiate the amount of Skywizard's damages based on loss of the $79 fee with reasonable probability. As counsel for the defendant pointed out at trial, were all of CPSI's Special Promotion customers to take advantage of the offer of one year's free internet service (as they theoretically could), the $79 per customer fee would be more than offset by the cost to Skywizard to service all of the new subscribers. Skywizard adduced evidence that as of March 2000 only one-third of CPSI's Special Promotion customers were Skywizard subscribers. If I could conclude with confidence that, had the September 1999 Special Promotion aired, only one-third of the resultant customers would have become Skywizard subscribers, Skywizard would have demonstrated that, by avoiding the cost of servicing the remaining two-thirds of the Special Promotion customers, it lost monies that would have been generated by the $79 fee. However, in view of the newness of the Skywizard enterprise, the fact that Skywizard imposed no deadline within which customers were obliged to accept the offer of one year's free internet service and the fact that Skywizard's evidence at most amounted to a snapshot of its customer base as of one point in time, I am constrained to conclude that the record is barren of sufficient historic company data from which a reliable projection of the composition of the customer base can be made. In view of the clear breach of contract, an award of nominal damages nonetheless is appropriate. *See, e.g., Susi v. Diamond Match Co.*, 158 A. 698, 699 (Me. 1932) ("In the absence of

[2] Skywizard's problems in proof derive in large part from the sheer newness of the enterprise a factor that has been observed to make it difficult (although not impossible) for a plaintiff business to prove lost profits with reasonable certainty. *See, e.g., Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 436 (2d Cir. 1993) ("Calculation of Nemer's lost profits would be highly speculative because as a two-year-old dealership that only recently began to show a profit in May 1992 it lacks a track record from which to extrapolate."); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Insurance Co. of N. Am.*, 955 S.W.2d 120, 132 (Tex. Ct. App. 1997), *aff'd*, 20 S.W.3d 692 (Tex. 2000) ("Clearly, while lost profits of a new or unestablished business generally cannot be recovered because they cannot be proved to a 'reasonable certainty,' they may be recovered if factual data is available to furnish a sound basis for computing probable losses.").

evidence [of damages caused by failure to market standing timber], only nominal damage may properly be assessed against defendant on this item.").

2. Paragraph II(11) of the Findings is amended to delete the second sentence and substitute the following: "In light of the foregoing, judgment shall enter in favor of Skywizard and against CPSI in the amount of $100.00."

3. The Judgment is amended to read in its entirety as follows:

Bench trial having commenced in the above matter on April 24, 2000 and concluded on April 25, 2000, the Honorable David M. Cohen, U.S. Magistrate Judge, presiding, and the court having rendered its Findings of Fact and Conclusions of Law on May 2, 2000, as subsequently amended on August 17, 2000, JUDGMENT is hereby entered for Skywizard.com, LLC and against defendant Computer Personalities Systems, Inc., for the sum of $100.00.

So ordered.

Dated this 17th day of August, 2000.

_____
David M. Cohen
United States Magistrate Judge

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 99-CV-275

SKYWIZARD COM LLC v. COMPUTER PERSONALITI Filed: 09/08/99
Assigned to: MAG. JUDGE DAVID M. COHEN Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 190
Lead Docket: None Jurisdiction: Diversity
Dkt# in other court: None

Cause: 28:1332 Diversity-Contract Dispute

SKYWIZARD COM LLC
plaintiff

PETER W. CULLEY
[COR LD NTC]
PIERCE, ATWOOD
ONE MONUMENT SQUARE
PORTLAND, ME 04101-1110
791-1100

NATHAN V. GEMMITI, ESQ.
[COR]
PIERCE ATWOOD

ONE MONUMENT SQUARE
PORTLAND, ME 04101
791-1100

JONATHAN M. STARBLE, ESQ.
[COR LD NTC]
ROGIN, NASSAU, CAPLAN, LASSMAN
& HIRTLE
CITY PLACE I, 22ND FLOOR
HARTFORD, CT 06103-3460
(860) 278-7480

v.

COMPUTER PERSONALITIES SYSTEMS INC
defendant

KAIGHN SMITH, JR.
[COR LD NTC]
DAVID S. SHERMAN, JR, ESQ.
[COR]
DRUMMOND, WOODSUM & MACMAHON
245 COMMERCIAL ST.
P.O. BOX 9781
PORTLAND, ME 04101
207-772-1941

WILLIAM E. MAHONEY, JR., ESQ.
[COR LD NTC]
DENISE M. BOWMAN, ESQ.

[COR]
STRADLEY, RONAN, STEVENS &
YOUNG, LLP
2600 ONE COMMERCE SQUARE
PHILADELPHIA, PA 19106
215/564-8000